55TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 1235.

JURISDICTION OF SUPREME COURT OF THE DISTRICT OF COLUMBIA IN CERTAIN CASES.

APRIL 30, 1898.—Referred to the House Calendar and ordered to be printed.

Mr. JENKINS, from the Committee on the District of Columbia, submitted the following

REPORT.

[To accompany S. 1910.]

The Committee on the District of Columbia have had under consideration Senate bill No. 1910, House bill No. 8345, and House bill No. 9480, and, after carefully examining the same, report as follows: That House bills Nos. 8345 and 9480, relating to the same subject, be laid upon the table, and that Senate bill No. 1910 do pass with the following amendment:

Strike out all after the enacting clause and insert the following:

That section four of the act of Congress entitled "An act relating to the supreme court of the District of Columbia," approved June twenty-first, eighteen hundred and seventy, be, and the same hereby is, amended so as to read as follows:

"That all the powers and jurisdiction by law held and exercised by the orphans' court of Washington County, District of Columbia, prior to the twenty-first day of June, anno Domini eighteen hundred and seventy, are hereby conferred upon the supreme court of the District of Columbia. Such powers and jurisdiction shall continue to be exercised by one of the justices of said court holding a special term for orphans' court business, and from his judgments, orders, and decrees there shall be the same right of appeal to the court of appeals of the District of Columbia as is given by section seven of the act of Congress establishing said court of appeals, approved February ninth, eighteen hundred and ninety-three: *Provided*, That nothing herein contained shall divest said court or said special term or said justice of any power or jurisdiction conferred upon said court or said special term or said justice by existing law.

"SEC. 2. That in addition to the jurisdiction conferred in the preceding section of this act, plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons res judicata, subject, nevertheless, to the provisions hereinafter contained.

"SEC. 3. That all issues of fact hereafter arising in the supreme court of the District of Columbia holding a special term for orphans' court business, including those relating to the execution or the validity of any will or testament, shall hereafter be tried

before said justice holding said special term, and that when required for such purpose jurors shall be drawn in the manner now by law provided for the drawing of jurors for service at the special term of the supreme court of the District of Columbia sitting as a circuit court for said District.

"SEC. 4. That no will or testament shall be hereafter admitted to probate and record in the said District until the following procedure shall have been followed: Whenever any will or testament shall be presented for probate and record to the said justice he shall direct all of the heirs at law or next of kin of the testator, or both, as the case may require, to be summoned to appear before him at a certain day, not earlier than ten days from the date of said presentation; if said summons shall be returned, personally served upon all of said heirs at law or next of kin, or both, at least five days before said return day, then, if no caveat be filed to said will, the said justice may forthwith admit the same to probate and record. But if any of said heirs at law or next of kin be returned "not to be found," then the said justice shall cause not less than thirty days' notice of the application for such probate to be published in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And upon such notified day, or such subsequent day as the court shall appoint, the said application for probate shall be heard, due proof of such publication being made; and if no caveat be filed, the said will or testament shall be admitted to probate and record. In all cases in which all of the heirs at law or next of kin of a testator, or both, consent to such probate and record, such will and testament shall thereupon be forthwith admitted to probate and record without the hereinbefore-described proceedings. In all cases in which any of said heirs at law or next of kin is an infant or of unsound mind, the said justice shall appoint a guardian ad litem for said infant or person of unsound mind: *Provided*, That in no case shall any will or testament be admitted to probate and record save upon formal proof of its proper execution.

"SEC. 5. That the preceding sections of this bill shall be subject to the following proviso: Any person interested in said probate who, at the time of the final decree admitting any will or testament to probate and record, is within the age of twenty-one years, may file a caveat to said will within one year after he becomes of age; and any person so interested who at the said time was returned "not to be found" and was proceeded against by order of publication, may file such caveat within two years after the date of said final decree; and any person actually served with process or personally appearing in said proceedings may file such caveat within one year after said date.

"SEC. 6. That whenever any caveat shall be filed issues shall be framed under the direction of the court for trial by jury: *Provided*, That in all cases in which all persons interested are sui juris and are before the court, the issues may be tried and determined by the court without a jury upon the written consent of all such parties. At least ten days prior to the time of trial all of the heirs at law or next of kin of the decedent, or both together, with all persons claiming under the will, shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. If any of them be an infant or of unsound mind he shall have a guardian ad litem appointed for him by the court before such trial shall proceed. If, as to any party in interest, the notification shall be returned "not to be found," the court shall assign a new day for such trial, and shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in the District of Columbia, and may order such other publication as the case may require. And the supreme court of the District of Columbia may from time to time prescribe and revise rules and regulations for service personally upon such party outside of the District of Columbia of a copy of such issues and notification, but personal service upon absent defendants shall in no case be essential to the jurisdiction of the court in the premises. Upon the day notified, or such subsequent day as the court shall appoint, the court shall proceed with the trial of said issues, due proof of such publication and, when required, of such personal service being made, and due opportunity being given to any party in interest to demand other and further issues. On the trial of any such issue exceptions may be taken to the rulings of the court, which shall be embodied in a bill of exceptions, to be settled and signed by the justice presiding within such time as may be fixed by the rules of practice prescribed from time to time by the supreme court of the District of Columbia in general term, and the said justice shall have the same power to set aside the verdict and grant a new trial that is possessed and exercised by the supreme court of the District of Columbia in cases tried with a jury according to the course of the common law, and as to such trials shall have all other powers now vested by law in the supreme court of the District of Columbia holding a special term as a circuit court. In all cases in which such issues shall be tried the verdict of the jury and the judgment of the court thereupon shall, subject to proceeding in error and to such revision as the common law provides, be res judicata as to all persons, nor shall the validity of any such judgment be impeached or examined collaterally.

"SEC. 7. That in addition to the power and jurisdiction conferred by this act and by prior laws upon the supreme court of the District of Columbia holding a special term for orphans' court business, said court is hereby given plenary authority to administer also the real estate situated in the District of Columbia of decedents, so far as may be necessary for the payment of debts and legacies, and to distribute among those entitled thereto any surplus proceeds of any sale of real estate made in the course of such administration, and that the bonds hereafter executed of all executors and administrators shall be responsible for the proceeds of sale of all real estate sold by them under the order of the said justice for such purposes of administration: *Provided, however,* That no such sale shall be made unless the same be required for the purposes of paying debts and such legacies as are chargeable upon the real estate, nor until the auditor of the court shall have ascertained and reported a deficiency of personal assets for such purposes, and such report shall be subject to exception.

"SEC. 8. That the foregoing sections of this act shall apply only to wills and testaments hereafter offered for probate, and, in cases of intestacy, to the estates of such persons as shall die after the passage of this act: *Provided,* That the supreme court of the District of Columbia holding a term for orphans' court business upon the petition of any person interested under any will heretofore filed in said court may offer the same for probate as a will of real estate, whereupon such proceedings shall be had as by this act are authorized in regard to wills hereafter offered for probate.

"SEC. 9. That the said justice may authorize and direct collectors heretofore or hereafter appointed to discharge pendente lite all or any of the duties of an administrator.

"SEC. 10. That the supreme court of the District of Columbia in general term is hereby authorized and empowered to make all such rules of practice as shall be necessary for the exercise of the jurisdiction hereby conferred, and to revise and alter such rules from time to time as it may deem proper.

"SEC. 11. That all laws and parts of laws inconsistent herewith are hereby repealed."

Copies of these several bills have been submitted to all of the judges in the District presiding over courts of record, and to the Commissioners of the District; and, after hearing from the learned judges of the District of Columbia and from the bar of the District, the committee recommend for passage the substitute for this bill. It is designed to remedy an anomalous condition of affairs existing in the laws of the District of Columbia inherited from the State of Maryland almost one hundred years ago. It is needless to say that such a condition exists nowhere else in the United States. But at the capital of the country the law remains as it was in the State of Maryland in February, 1801, save in the comparatively few instances where Congress has interposed by amendatory legislation such as is here sought.

The most pressing evil which requires remedy is the following: A man dies in the District of Columbia owning both personal and real estate. His will is presented for probate and record in the supreme court of the District of Columbia holding a special term for orphans' court business. His children or other next of kin file a caveat to this will, alleging want of testamentary capacity on the part of the testator, or the existence of fraud or undue influence in the obtaining of this will. Issues are thereupon made up and sent for trial before a judge and jury at a special term of the same court sitting as a circuit court. The verdict we will suppose, finds all these issues in favor of the will. This verdict is sent back to the special term for orphans' court business and a judgment is there entered allowing probate to the will. This judgment is final, provided no appeal be taken, with respect to the personal estate of the testator. But the same persons who had procured the issues, and who are absolutely bound by the verdict and judgment entered upon them, file a declaration in ejectment in the same court as heirs at law of the testator.

Upon a trial of this ejectment they assail the same will upon the same issues, and we will suppose that a verdict is rendered against the will. Here we have two absolutely contradictory verdicts upon the same

issues in the same court. We have contradictory judgments entered upon those verdicts. Of a similar condition of things formerly existing in England, and long since remedied there, Lord Chief Baron Yelverton, in 1785, said:

> I believe no two acts can be supposed to be more intimately connected with each other, both in unity of time and of assurance, than a will of real and personal estate, written upon one and the same piece of paper or parchment, and subscribed by one and the same signature. And yet it is clear law that, though the probate of such a will is conclusive evidence of the sanity of the testator to make such a will, yet it is by no means conclusive evidence of his capacity to dispose of his real estate. And why? Evidently because of the capacity of the party to do the two acts is triable by different jurisdictions. From all which I am warranted to lay it down as a general position that the capacity of the party to do one act is not conclusive of his capacity to do another, if his capacity to do that other be triable by a different jurisdiction, whether the two acts make one and the same assurance, or are done at one and the same time or not. (Hume *v.* Burton, 1 Ridgway P. C., 277.)

Nearly half a century before (A. D. 1742), Lord Chancellor Hardwicke had denounced this frequent result of a divided and independent jurisdiction as a "very great absurdity." He said, among other things:

> I wish gentlemen of ability would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the legislature. (Montgomery *v.* Clark, 2 Atkyns, 379.)

The invocation of the lord chancellor remained unheeded in England until 1857, and to this date, though reinforced by the examples of the States generally, if not universally, has had no effect upon legislation for the District of Columbia.

The above language was recently quoted by the court of appeals of the District of Columbia in the case of Perry et al. *v.* Sweeny (25 Law Reporter, p. 724).

Another great evil constituting a constant menace to the safety of real-estate transactions is this: Under existing law the will of a testator may be assailed in an ejectment suit at any time within twenty years, and in certain cases of disability under the statute of limitations a still longer period is allowed.

A further object of the proposed legislation is to give to the supreme court of the District of Columbia holding a special term for orphans' court business plenary jurisdiction for the administration of both the personal and real estate of the decedent. Such jurisdiction is vested in probate courts throughout this country generally. There is no reason why a person interested in the estate of a decedent, whether as creditor or as devisee, should be compelled to resort to one branch of a court for his remedy with respect to the personalty and to another and a different branch with respect to the realty. A subordinate and incidental evil to be remedied is this: There are very many contests over wills in the District of Columbia. Under the law jury trials in such cases have precedence over all other business. In consequence of this, suitors on the common-law side of the court are delayed indefinitely, and to their very great injury, while the juries are occupied in determining questions involving the validity of wills. The proposed legislation gives the special term sitting for orphans' court business a jury so that the sending of issues and the consequent blocking up of the business of the circuit court will no longer be necessary. There has never been any complaint that these cases were not tried promptly enough; the complaint has been just the opposite—that the precedence given to them under the law blocked and delayed other court business.

The proposed legislation, being a substitute bill prepared by a committee of the Bar Association of the District of Columbia, has been sub-

mitted to and carefully considered by the court of appeals and the supreme court of the District, and also by the District Commissioners. It has the unanimous approval of the three judges of the court of appeals. Of the six judges of the supreme court of the District of Columbia five approve it unqualifiedly. The Commissioners of the District of Columbia also approve it. All of the above named not only approve this legislation, but recommend its adoption. The bar association, whose committee has prepared it, are urgent in asking its enactment.

Certain objections to the bill have been stated in writing by Mr. Justice Hagner, of the supreme court of the District of Columbia. In order to remove possible difficulties of interpretation apprehended by Mr. Justice Hagner, the committee of the bar association has amended the original draft of this substitute, and it is thought that there is no longer any possible room for doubt with respect to the interpretation of the substitute.

The other main objection of Mr. Justice Hagner is based upon the danger of disturbing the provisions of the Maryland testamentary act of 1798. Without detracting in any way from the merit of that act, it is sufficient to say that it is a century old; that its provisions have been changed in many respects in Maryland, and it is not surprising that a system of testamentary law which was fully competent to the needs of a provincial community in the year 1798 should not respond to the requirements of the capital of the nation in the year 1898. It is urged by Mr. Justice Hagner that the provisions of the substituted bill would operate to favor the fraudulent concealment of wills in order that the intestacy of a decedent may become res judicata; but there is no force in this objection, as nothing in the bill prevents the probating of a newly discovered will, no matter when discovered, within a reasonable time after its discovery.

Mr. Justice Hagner, in his letter to Senator Faulkner, stating very forcibly the need for amendatory legislation, has made a very strong argument for the passage of the substitute now proposed.

The remedy offered by Judge Hagner is merely a matter of convenience. It allows this same special term to admit to probate and record wills of real estate, and allows certificates of the judgment of probate to be used as prima facie evidence in an ejectment or other suit to prove such will. But, as has been said, this is merely a matter of convenience. Instead of producing the will and proving it by one or more witnesses, the record of probate is produced. But as the effect of this record is explicitly said to make only a prima facie case, none of the gross evils which we have above adverted to are at all remedied. It would still be possible to have in the same court contradictory verdicts and judgments with respect to the very same will.

For these reasons we recommend the adoption of the substitute measure, which we herewith report.

So far as your committee are able to learn, the substitute bill is indorsed by the bar and the bench of the District of Columbia, with the exception of his honor Mr. Justice Hagner, associate justice of the District. The supreme court of the District carefully considered the same and presented their views through the chief justice, as follows:

WASHINGTON, *March 24, 1898.*

SIR: Your communication of the 3d instant was duly received, and would have been much sooner answered but that I have found that there is not entire unanimity of opinion by the justices of this court in regard to the matters submitted for our consideration, and, further, that the committee of the bar association have taken some time to frame suggested amendments to the House bill inclosed by you.

The situation seems to be that five justices of this court favor the passage of the House bill if amended substantially as proposed by the committee of the bar association (a copy of such proposed amendments being herewith inclosed), provided that can be accomplished during the present session of Congress. If that can not be done, by reason of any opposition thereto, then they cheerfully unite with their associate, Mr. Justice Hagner, who opposes the House bill, in recommending the passage of Senate bill 1910 as a measure that will give a much-needed relief. This relief would also be furnished by the House bill, and five of the justices believe that the further provisions of the latter, with proposed amendments, would afford relief of great benefit to the practice and litigants in this court. At Justice Hagner's request, I inclose his written objections and criticisms to House bill. Some of them are obviated and answered by the proposed amendments of the bar association committee. I have not time to notice Justice Hagner's statement further, but submit the whole matter to the consideration of the Committee on the Judiciary.

Very respectfully,

E. F. BINGHAM,
Chief Justice Supreme Court District of Columbia.

Hon. JOHN J. JENKINS,
Chairman Subcommittee on the Judiciary, House of Representatives.

Your committee were also favored with a communication from the court of appeals of the District, through the Hon. R. H. Alvey, chief justice, which is as follows:

WASHINGTON CITY, D. C., *March 21, 1898.*

SIR: I herewith inclose bill H. R. 8345, as revised and modified by the judges and attorneys of the District, upon consultation. The changes from the original bill are in mere matter of detail, as to process of procedure in order to bind parties concerned with some additional provisions. The bill as thus modified is thought to be proper to be passed as a law for this District. Indeed, there is great need for such statute, and I hope Congress will not hesitate to pass the bill thus recommended by the bench and bar of this District.

Respectfully, etc.,

R. H. ALVEY,
Chief Justice.

CHAIRMAN COMMITTEE ON THE DISTRICT OF COLUMBIA,
HOUSE OF REPRESENTATIVES.

The entire subject was submitted to the Commissioners of the District of Columbia. They carefully considered the same and are unanimously in favor of a change in the law. Their letter is as follows:

OFFICE COMMISSIONERS OF THE DISTRICT OF COLUMBIA,
Washington, April 8, 1898.

DEAR SIR: The Commissioners recommend favorable action upon the bill "To amend section 4 of the act of Congress entitled 'An act relating to the supreme court of the District of Columbia,' approved June 21, 1870, and for other purposes," which was referred to them at your instance for their examination and report.

Very respectfully,

JOHN W. ROSS,
President Board of Commissioners District of Columbia.

Hon. J. W. BABCOCK,
Chairman Committee on the District of Columbia, House of Representatives.

As his honor, Mr. Justice Hagner, went to the trouble to prepare his views with reference to the matter, while it is adverse to the committee's views of the case, your committee feel it to be their duty to incorporate the views of the learned associate justice for the information of the House. His communication is as follows:

The House Committee of the District of Columbia has requested this court to express its opinion as to whether it would be proper to adopt one or the other of two bills now before it, each of which has reference to proceedings in that branch of the supreme court of the District of Columbia known as the orphans' court.

As the report to be made by the chief justice in behalf of the court mentions that my opinion on the subject differs from that of the majority of the court, it is proper I should explain the reason why, to my regret, that difference of opinion exists.

After the Supreme Court of the United States had decided in Campbell *v.* Porter,

162 U. S., 478, that the orphans' court of this District had no power to admit to probate a will or codicil devising real estate, the only method existing by which such probate could be accomplished was through application to the equity court. To avoid the expense and delay of that form of proceeding the bill known as Senate bill No. 1910 was prepared and presented in the Senate and referred to the District Committee in May, 1897, and has been reported favorably by the committee.

This bill was confined to the only subject then known to this court connected with the jurisdiction of the orphans' court requiring amendment. That the speedy adoption of some measure to accomplish the purpose designed is of the utmost importance no one will deny.

It is not objected by anybody that the provisions of the Senate bill are not proper and adequate to accomplish the sole object proposed.

In February, 1898, the House bill was introduced by request, and referred to the House Committee of the District. This measure professes to accomplish all that the Senate bill contains, and also proposes several other changes in the testamentary law existing in the District. I am opposed to it, because several of these changes, in my opinion, are injudicious, and because the language of some of the provisions in several particulars is incautious and calculated to produce confusion and uncertainty rather than to accomplish any beneficial end.

In the first section the future powers and jurisdiction of the orphans' court are expressly limited to those "held and exercised by the orphans' court of Washington City prior to the 21st of June, 1870," and to those additional powers intended to be conferred by the new act.

But these terms of exclusion would deprive the court hereafter of many jurisdictional powers conferred by Congress since June, 1870. Among those thus omitted I will only refer to the acts of January 17, 1887, authorizing the orphans' court to reduce the penalty of testamentary bonds where the testator declares his desire to dispense with security (24 Stats., 361); of the 28th February, 1887 (24 Stats., 431), respecting bonds of foreign executors; of February, 1890, respecting the adoption of children; of October, 1890, authorizing the court to accept trust companies as sureties on bonds and as guardians, executors, and administrators; of March 3, 1891, referring to apprentices, and of June, 1896, relative to natural guardians. As the exercise of each of these powers is beneficial to the public, the omission must have been through inadvertence rather than by design.

The third section declares that "all issues to try the execution or validity of any will shall be tried before the justice holding the orphans' court, and that when required for such purposes jurors shall be drawn in the manner now by law provided for the drawing of jurors for service at special terms of the courts sitting as circuit courts." This section was undoubtedly designed to provide that the jury referred to should serve in the orphans' court, and that such issues should no longer be triable in the circuit court. This change, in my opinion, is unnecessary and unwise.

By the Maryland act of February session, 1777, chapter 8, a jury could be summoned to hear any issues in the orphans' court; but under the testamentary system of 1798, chapter 101, which is our law here, that power was withdrawn. It has never since existed in Maryland, and neither in Baltimore, the seventh city of the Union in population, nor in the counties of the State, which have a full share of contests over wills, has the necessity of any change in this particular ever appeared.

I understand one ground of complaint with the present system is the alleged delay and trouble accompanying the transfer of the issues and verdicts from one court to the other. But this delay or trouble seems to me to be practically imaginary. After the justice in the orphans' court has signed the issues, it can not take ten minutes to carry the copy to the clerk's office near at hand, where the case is instantly placed upon the circuit court docket. And after the verdict has been rendered in the circuit court, no longer time is consumed in bringing a copy of the findings into the orphans' court, where the verdict is entered frequently on the same day. In Baltimore City the orphans' court for many years has been held in a different building, at a considerable distance from those occupied by the circuit courts, but I have never heard that any one ever complained of any trouble or delay from this cause.

The chief difficulty is said to arise from the delay in hearing the issues in the circuit court. But whenever this really exists it is not from any fault in the system, but from the delays of the parties or the counsel.

By the act of 1798, chapter 101, the trial of the issues is directed to take place in the trial court "as soon as may be, without any continuance longer than is necessary to procure the attendance of a witness or witnesses;" and the rules of practice of those courts invariably accord that preference. But the trial courts can not always compel an immediate hearing where both parties are willing to delay it, or where a good ground of continuance occurs, as from absence of witnesses. If a good excuse appears, the court will grant the continuance, whether the cause is on hearing in the orphans' court or in the circuit court—with the difference that there is no such

requirement in the new bill for an immediate hearing in the orphans' court before the jury as is enjoined by the act of 1798, chapter 101. But the court, in either tribunal, can dismiss the case if it finds the issues have been asked merely to try to extort a compromise. In the orphans' court, on the suggestion that the caveator has delayed to send up the issues, and that his conduct produces the belief that his object is to delay with the view to extort money, the justice presiding, after notice to the side complained of and in absence of a satisfactory denial, has revoked the issues and admitted the will to probate.

I can not see that the remedy proposed will cure any of the supposed evils.

The Maryland act of 1798, chapter 101, forming its testamentary system, consists of 15 subchapters, containing upward of 190 sections. It is a wonderful work, prepared by Chancellor Hanson at the request of the legislature. Almost every section has been submitted to judicial examination during this full century of trial, and the meaning of its language determined by the decisions of the courts. Such a system should be interfered with only after grave inquiry, for no one who has not read and studied every section it contains can possibly understand their mutual relation and effect.

Several of the provisions of the bill are wanting in that clearness of expression that should appear in an act of Congress. Although there is a general reference to the provisions of the act establishing the District court of appeals, it is not explained how an appeal from the orphans' court with the jury is to be effected. Under the statute of Westminster no bill of exceptions would lie from any court except a civil court of law, and such is still the rule, except where the right has been given by statute expressly or by necessary implication.

In 10 G. & J., 372 Mayhew *v.* Soper, the Maryland court of appeals held that no bills of exceptions were allowed from orphans' courts.

In 36 Maryland, 613 Barth *v.* Rosenfield, the court of appeals decided that where a statute authorized a jury to be drawn for the trial of issues from chancery in one of the equity courts of Baltimore city "when proceedings shall be had in such cases as is usual in like cases in equity," no bill of exceptions would lie, since the right was not sufficiently conferred by the terms of the act.

Under the language of section 3, as it seems to me, a bill of exceptions would no more lie from rulings of the justice on trials before a jury in the orphans' court than from rulings in admiralty, or from a justice of the peace with a jury, or from an equity court.

The provision in section 7 is equally uncertain in its language. It gives "plenary" jurisdiction to the orphans' court as to personal and real estate "so far as may be necessary for payment of debts and legacies," but gives no jurisdiction respecting it for distribution, an omission that may create uncertainty in view of the 11th section of the bill repealing all inconsistent laws.

If this "plenary" authority to sell lands is allowed, the right must remain to the heirs to contest the proceeding, according to the immemorial practice in courts of equity under the statutes on the subject. That practice required the filing of a bill, with the right to demur, plead, or answer, and to have the requisite proofs taken before the decree shall pass. But nothing concerning these rights is mentioned in this bill, and in their absence the orphans' court has no authority to exercise them, and possesses no machinery to put them in execution. The testimony could not be taken by the register of wills or his clerks, and the examiners in chancery could no more act in such proceedings, in the absence of express legal authority, than they could take testimony in a circuit or criminal court.

No provision is made for issuing subpœnas; or for keeping dockets, as in equity courts; nor for regulating the costs, which are different in the two courts. No crier or bailiffs are provided to keep order and take charge of the juries. The provision that the general term is empowered "to make all such rules as shall be necessary for the exercise of the jurisdiction thereby conferred" can not supply these omissions, for those subjects are regulated by law.

The necessary machinery for inaugurating the new system is not provided in the bill. The orphans' court room is the smallest court room in the building, the open space less than 17 feet wide; very indifferently ventilated, and scarcely large enough to accommodate the twenty-six jurors who are to be drawn. This room and those communicating are occupied by the records and clerks, and there is scant room for the great number of persons who are constantly drawn there by business.

If it be suggested that the presiding justice may hold the trials elsewhere in a larger room, there will arise the same want of space, to which the court, whose room is thus occupied, can transfer its own sittings. The orphans' court is held by one of the justices holding an equity term. That term is constantly occupied with important business, which would have to be suspended while the prolonged trials in will cases are in progress. Those sensational contests are frequently continued for a month, and sometimes twice that time; and the character of the testimony invariably draws great crowds, who listen with eagerness to the accounts of the vices or follies of the

testator. The equity business which will be thus suspended is quite as important as the trial of will cases. The regular orphans' court business will suffer from the same cause, and that court is quite as important as any other in the system, and there is no reason for crowding it aside in favor of any other.

The provisions of sections 2 and 5, which declare that decisions upon a caveat shall be "res judicata," and not capable of being disturbed after one or two years, according to the circumstances, in my opinion is liable to encourage fraudulent practices in the concealment of wills. Some members of this court are acquainted with the Crauford case in Prince George County, Md., in which a will of undoubted genuineness was brought to light after more than twenty years' concealment. In consequence of this concealment large personal and real estate of a decedent had been distributed as in intestacy, the heirs at law believing all the time a will had been made. After the entire estate had been sold and had changed hands the missing will was produced from the receptacle in which it had been placed at the beginning of the war at the request of a man who said he was going South. The will was promptly admitted to probate as soon as the heirs at law who were the devisees were apprised of its existence, and they were thus enabled to make a compromise settlement with the purchasers of the land which properly belonged to them. Of course they would have totally lost their estate if such a statute as that now suggested had been in existence. The limitations proposed by the bill are too short, as it seems to me.

The ninth section declares "that the said justice may authorize and direct collectors heretofore and hereafter appointed to discharge pendente lite all or any of the duties of an administrator."

This provision introduces into the testamentary system an entirely novel feature. By the existing law, in case of delay because of the absence from the District of the executor, or of a contest relative to the right of administration, or of a contested will, the orphans' court is authorized to issue letters of collection for the preservation of the goods of the deceased and the returning of an inventory; the form of the collector's bond is prescribed, and his powers are explicitly confined to the collection of the personal assets; and to the sale, under an order of the court, of such chattels as are perishable and not to be preserved, and to account for the same; and it further provides that "no collector as aforesaid shall have power to bring suit for debts, or to release the same, or to do any act further than is before mentioned."

In opposition to this settled policy of the law, it is proposed that the justice may authorize and direct collectors heretofore or hereafter appointed to perform duties not contemplated in his appointment or secured by the statutory bond, and this upon a mere order of the justice. One advantange of the present law is its tendency to discourage speculative contests over wills; and this benefit will be lost by the change, which I conceive to be needless, inconsistent with the policy of the testamentary system, and dangerous to its safe administration.

I have briefly gone through the more prominent defects of the proposed measure, though there are some errors of expression that ought not to be retained. The needless use of the word "plenary," in two places, may serve to create difficulty, as the expression "plenary proceedings" describes a distinct form by which an appeal under the general testamentary system is perfected.

For ten years this community suffered from the careless provisions of the act of 1888, which was finally declared void by the Supreme Court in Campbell *v.* Porter. That imperfect statute caused a large actual expenditure of money for costs incurred in the resort to chancery to prove wills of realty. The taxed costs in one of those cases, as appears from statements made by the clerk, exceeds $70, independent of fees to counsel. The loss to suitors by way of interest from the delays, and from the other inconveniences arising from this mistake, would doubtless amount to a very considerable sum. Congress may well exercise very great caution in legislating again on this same subject.

The only existing grievance is the absence of jurisdiction in the orphans' court to admit to probate the wills of realty, which will be effectively and safely removed by the adoption of the Senate bill.

The evils or inconveniences, if they be such, designed to be cured by the House bill are a century old, and their consideration may well be left for another session, by which time a plan of codification of the District laws may be completed, or a more carefully prepared bill presented for the action of Congress.

There is no reason why the cases of contested wills (now nine in number) should not be placed on a special part of the trial calendar of the circuit courts (as is done with appeals from justices of the peace), and set down for hearing at the opening of the several terms, nor why every such case may not be tried or otherwise disposed of during the next April term of the three civil jury terms, if the parties desire them to be heard, unless some special reason for delay appears, in accordance with the injunctions of the act of 1798, chapter 101. This form of contest receives suffi-

cient protection under the law as it stands, and there is no reason why such special encouragement should be given to it, as would be the effect of the proposed bill.

It would be far better to provide for the appointment of an additional justice of this court who might hear such cases in a new circuit court than to pass a bill which would produce difficulties and delays in the proceedings of the present courts.

The gravity of our situation as to titles of lands claimed through wills filed here does not seem to be appreciated. Under the undoubted law as settled by the supreme court, not a single will of real estate has been properly admitted to probate by the orphans' court since the establishment of the District of Columbia.

We constantly see attempts by suits to ravel up ancient titles upon alleged technical defects. If Congress continues to neglect to give to the orphans' court adequate jurisdiction to admit wills of real estate to probate, why may we not expect to see the testamentary dispositions of our great philanthropists attacked upon the ground that they have never been admitted to lawful probate, as well as the modest devises of the average citizen?

To leave things in their present condition would be a real calamity, and the difficulties of rectifying the evil increase each year. The first section of the Senate bill will prevent all trouble as to future wills. The second section contains a provision (not in the House bill) which affords a ready mode to admit to probate wills of real estate heretofore probated as wills of personalty. The safest and best disposition of the question certainly will be to pass the Senate bill as it stands, instead of embarrassing the success of this indispensable amendment by attaching provisions of doubtful expediency, and which, if valuable, may well be postponed without injury.

The suggestion has been made that the House bill may be amended. But such amended bill is not before us, and it is impossible to say whether it will prove satisfactory until it has been presented for examination.

All which is respectfully submitted.

A. B. HAGNER, *Associate Justice.*

MARCH 23, 1898.